IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Neil T. Nordbrock,

Plaintiff,

v.

United States of America,

Defendant.

NO. CV-99-444-TUC-JMR

ORDER

Pending before the Court are Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief Can Be Granted, Plaintiff's Motion for Summary Judgment and Plaintiff's Writ of Mandamus in the Form of a Complaint. Although titled as a motion, Plaintiff states in his "Response to the March 6, 2000 Order of the Honorable James C. Carruth" that his motion for summary judgment is his response to Defendant's motion to dismiss.[1] Accordingly, the Court construes Plaintiff's Motion for Summary Judgment as his response to Defendant's Motion to Dismiss. Therefore, only three motions remain for the Court's consideration, Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Defendant's Motion to Dismiss for Failure to State a Claim and Plaintiff's Writ of Mandamus in the Form of a Complaint. For the reasons stated below,

[1]In his "Response to the March 6, 2000 Order of the Honorable James C. Carruth," Plaintiff also states that his Writ of Mandamus in the Form of a Complaint is in response to Defendant's motion to dismiss. However, because Plaintiff's Writ of Mandamus seeks an order compelling the Department of Justice to prosecute certain IRS employees and to restrain the IRS and Department of Justice from furthering harassing Plaintiff, the Court does not construe Plaintiff's Writ of Mandamus as part of his response to Defendant's motion but as a separate claim for relief.

Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction is denied, Defendant's Motion to Dismiss for Failure to State a Claim is denied in part and granted in part and Plaintiff's Writ of Mandamus in the Form of a Complaint is denied.

BACKGROUND

In 1982, the IRS asked Plaintiff to turn over copies of tax returns he prepared from 1978-1981. Plaintiff refused. As a result, the IRS, pursuant to 26 U.S.C. § 6695(d), assessed penalties against Plaintiff in the sum of $75,000.[2] The IRS filed notices of federal tax liens with the Pima County Recorder against Plaintiff[3] and Swan Business Organization[4] as nominee of Plaintiff.

In August, 1983, the government filed an action in federal court seeking an injunction against Plaintiff to compel him to turn over the requested tax return information. (83-CV-553 TUC WDB). In December of 1983, after paying $250.00 towards the penalties,

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[2]Pursuant to 26 U.S.C. § 6995(d), Plaintiff was assessed the maximum penalty, $25,000, for each of the three years he refused to turn over information. The first penalty was assessed June 28, 1982, and the second and third penalties were assessed on December 28, 1982.

[3]The IRS released the federal tax liens against Plaintiff on September 15, 1990. Although Plaintiff alleges in his "Memorandum and Supplement in Support of Plaintiff's Motion for Default Judgment and/or Motion for Summary Judgment" that the IRS rescinded all liens it had filed against him and Swan Business Organization, the exhibits attached to Plaintiff's complaint show that the IRS only released the liens it had against Plaintiff, not the liens it had filed against Swan Business Organization.

[4]In 1971, Plaintiff and his wife, Evelyn R. Nordbrock, purchased property (Swan Road Property) as joint tenants with right of survivorship. On August 23, 1983, Plaintiff and his wife conveyed this property to Swan Business Organization, an organization owned by Plaintiff. Therefore, on September 15, 1983, the IRS filed a notice of federal tax lien against Swan Business Organization as Plaintiff's nominee.

Plaintiff filed a separate suit in federal court seeking a refund of the $250.00 and an abatement of the remainder of the penalties. (83-CV-2398 PHX RCB). In the lawsuit initiated by Plaintiff, the government filed a counterclaim for $74,750, the balance of the assessment still owed by Plaintiff.

In the government's action for injunctive relief, the district court issued summary judgment in favor of the government. Summary judgment was also issued in favor of the government in Plaintiff's action for refund and abatement. Plaintiff appealed both decisions.

The cases were consolidated on appeal. The Ninth Circuit reversed and remanded both cases, finding that a material issue of fact existed with respect to whether Plaintiff acted wilfully in refusing to turn over the requested tax return information to the IRS. See United States v. Nordbrock, 828 F.2d 1401 (9th Cir. 1987).

On remand, the cases were consolidated. (83-CV-553 TUC WDB). A bench trial was held. The district court concluded that Plaintiff had acted wilfully in refusing to turn over the requested information to the IRS. The court enjoined Plaintiff from preparing tax returns for other taxpayers and sustained the $75,000 in penalties assessed against Plaintiff. Plaintiff appealed.

On appeal, the Ninth Circuit again reversed and remanded. The Court found that Plaintiff was entitled to a trial by jury. See United States v. Nordbrock, 941 F.2d 947 (9th Cir. 1991).

On remand, a jury trial was conducted. The jury found that Plaintiff had not acted in good faith and wilfully had failed to comply with the law. Pursuant to 26 U.S.C. § 7407(b), the court

issued a lifetime injunction against Plaintiff prohibiting him from preparing tax returns for other taxpayers. In addition, the court found that Plaintiff was not entitled to a refund or an abatement. At that time, however, the court did not enter judgment on the government's counterclaim for the unpaid balance of the penalties.[5] Plaintiff appealed.

On October 11, 1994, the Ninth Circuit affirmed the jury's verdict, the district court's issuance of the lifetime injunction, and the penalties assessed against Plaintiff. See United States v. Nordbrock, 38 F.3d 440 (9th Cir. 1994).

During the pendency of these lawsuits, in October 1992, the IRS seized the Swan Road Property. A notice of seizure was sent to Swan Business Organization as nominee of Plaintiff on October 9, 1992. The IRS also began proceedings to sell the Swan Road Property, preparing a minimum bid worksheet on October 16, 1992. However, these proceedings were stayed due to Swan Business Organization and Plaintiff filing for bankruptcy on October 13, 1992 and July 27, 1994, respectively. Swan Business Organization's bankruptcy petition was dismissed on August 2, 1994 and Plaintiff's personal bankruptcy was dismissed on December 4, 1995.

Once the bankruptcy actions were dismissed, the IRS proceeded to sell the Swan Road Property pursuant to a sealed bid sale on April 12, 1996. The property was sold on April 25, 1996 for $62,501.10.

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[5] On June 3, 1993, the district court issued an amended judgment, entering judgment in favor of the government and against Plaintiff on the government's counterclaim for the unpaid balance of the penalties. This amended judgment was entered nunc pro tunc as of October 28, 1992.

On September 7, 1999, Plaintiff filed the instant case. Plaintiff seeks a refund of $62,501.10, the amount realized from the sale of the Swan Road Property, reasonable attorneys' fees and costs and whatever further relief the Court deems justified.

On December 15, 1999, Defendant filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. On December 20, 1999, Plaintiff filed a Writ of Mandamus in the Form of a Complaint. Because a lack of subject matter jurisdiction would preclude the Court from deciding this case, the Court will address Defendant's motion to dismiss based on lack of subject matter jurisdiction first.

A. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction

Defendant argues that this Court lacks subject matter jurisdiction for two reasons. First, Defendant contends that because this lawsuit is a claim for a refund of taxes, jurisdiction of the court is governed by 28 U.S.C. § 1346. Although the government has waived its sovereign immunity for such suits, 26 U.S.C. § 7422, Defendant argues that in order for jurisdiction to exist under these sections, there must have been an overpayment of the tax. Defendant contends that there has been no overpayment in this case. Although the Ninth Circuit has recognized a limited exception to the overpayment jurisdictional requirement where a taxpayer never receives notice of assessment and demand for payment prior to having his property levied, Martinez v. United States, 669 f.2d 568, 569 (9th Cir. 1982), Defendant argues that Plaintiff does not fall within this exception because he received notice and

demand for payment of the assessed penalties prior to the seizure and sale of the Swan Road Property.

Second, Defendant argues that the Court lacks jurisdiction due to Plaintiff's failure to timely file an administrative claim for refund within two years from the time the tax was paid, a jurisdictional prerequisite.[6]

Plaintiff alleges in his complaint that this Court has jurisdiction of this case pursuant to 28 U.S.C. § 1346(a)(1). In response to Defendant's motion to dismiss for lack of subject matter jurisdiction, Plaintiff argues that there was an overpayment of tax because Defendant did not levy on the Swan Lake Property within the six year statute of limitations. In addition, Plaintiff claims that he submitted a timely administrative claim for refund because he filed a Form 6118 with the IRS within three years from the date of the sale of the property.

1. 28 U.S.C. § 1346(a)(1)

Plaintiff alleges that the Court has jurisdiction pursuant to 28 U.S.C. 1346(a)(1). This section provides:

> (a) The district courts shall have jurisdiction...of:
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> > (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any matter wrongfully collected under the internal-revenue laws.

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[6]Although Defendant did not raise this argument until its reply, Defendant correctly states that issues regarding subject matter jurisdiction may be raised and considered at any time. May Dep't Store v. Graphic Process Co., 637 F.2d 1211, 1216 (9th Cir. 1980); Fed. R. Civ. P. 12(h)(3).

The Supreme Court has interpreted § 1346(a)(1) as requiring full payment of the assessed tax or penalty before an income tax refund suit can be maintained. Flora v. United States, 362 U.S. 145, 177 (1960). See also United States v. Boynton, 566 F.2d 50, 52 (9th Cir. 1977) ("It has long been established that partial payment of assessed taxes or a proposed deficiency is insufficient to support jurisdiction in the [d]istrict [c]ourt of a refund suit under 28 U.S.C. § 1346."). Here, Plaintiff has paid only $250.00 of the penalties assessed against him. However, as Plaintiff correctly points out, there is an exception to the full payment requirement with respect to divisible tax assessments.[7]

Under the divisible tax exception, a taxpayer need only pay the divisible amount of the penalty assessment before instituting a refund action. Boynton, 566 F.2d at 52. According to the Federal Tax Coordinator ¶ T-9007, divisible taxes include manufacturer's excise tax; highway use tax; wagering tax; FICA and FUTA taxes; income withholding tax on wages; the 100% penalty under 26 U.S.C. § 6672 for failure to collect and pay over various taxes; the excise tax on transfers to foreign trusts; and excise taxes imposed on prohibited acts of private foundations, black lung benefit trusts, charitable organizations, 26 U.S.C. § 501(c)(4) social welfare organizations, and qualified pension plans.

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[7]Plaintiff states that another exception to the full payment requirement occurs when the government asserts a counterclaim for the unpaid portion of the tax asserted to be due in the same action in which Plaintiff seeks a refund. Although this exception was applied in Freeman v. United States, 265 F.2d 66, 69 (9th Cir. 1959), the vitality of this exception was called into doubt in Boynton, 566 F.2d at 55-56 n. 10. In any event, the government has not counterclaimed for the unpaid penalties in this case.

The penalties assessed against Plaintiff were assessed pursuant to 26 U.S.C. § 6695(d). This section allows the IRS to assess a penalty of $50.00 for each violation, the total penalty not to exceed $25,000. Because the penalties assessed against Plaintiff are divisible by $50.00, Plaintiff did pay a divisible portion of the tax assessment. Therefore, the full payment requirement does not strip jurisdiction from this Court.[8]

2. 26 U.S.C. § 7422(a)

Despite meeting the jurisdictional requirements under 28 U.S.C. § 1346(a), Defendant argues that this Court lacks jurisdiction in this matter because Plaintiff failed to file an administrative claim for refund within two years from the date the penalty was paid as required by 26 U.S.C. § § 7422(a)[9] and 6511(a). In addition, Defendant argues that in order for this Court to have jurisdiction under §7422(a), Plaintiff must show that there has

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[8]In Case No. CV-99-199 TUC ACM, consolidated with CV-99-293 TUC ACM, Judge Marquez determined that "[t]o the extent that Plaintiffs' complaint can be interpreted as a claim for refund, the Court lacks subject matter jurisdiction because Plaintiffs have not paid in full all of the assessed amounts." However, Judge Marquez did not consider the divisible tax exception to the full payment requirement.

[9]Section 7422(a) provides:

> **(a) No suit prior to filing claim for refund.**--No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

been an overpayment of tax, which he has failed to do.

Defendant's argument regarding Plaintiff's failure to timely file an administrative claim is without merit. Defendant relies upon the wrong statute of limitations, 26 U.S.C. § 6511(a). The correct statute of limitations for filing a claim for refund of any penalty assessed pursuant to § 6695 is three years. 26 U.S.C. § 6696 (d)(2). Plaintiff filed his claim for refund with the IRS on December 17, 1998, within three years from the date the Swan Road Property was sold. Therefore, Plaintiff did file a timely administrative claim.

However, § 6696(d)(2) requires that there be an overpayment of the penalty assessed, which is the same argument Defendant asserts as another basis for the Court lacking jurisdiction under § 7422(a).

3. Overpayment

Defendant is correct that "an overpayment must appear before refund is authorized." Lewis v. Reynolds, 284 U.S. 281, 283, amended by 284 U.S. 599 (1932). Although the Lewis Court precluded a statute of limitations defense in a refund action, this holding was superseded by statute. Currently, 26 U.S.C. § 6401 provides: "The term `overpayment' includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto." Plaintiff contends that because the sale of the Swan Road Property occurred outside the applicable statute of limitations, there has been an overpayment of tax in this case.

Both parties agree that 26 U.S.C. § 6502(a) applies here. However, the parties dispute which version of § 6502(a) applies--the pre-1988 version or the 1988 amendment.

Section 6502(a) governs the length of time the government has to levy on an assessment of unpaid taxes. It has been amended twice since the penalties were assessed against Plaintiff in 1982. Prior to 1988, the statute provided:

> (a)Length of period.--Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun--
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> (1) within 6 years after the assessment of the tax, or
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> (2) prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).
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> The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. The period provided by this subsection during which a tax may be collected by levy shall not be extended or curtailed by reason of a judgment against a taxpayer.

In 1988, Congress replaced the last sentence with the following:

> If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable.

According to the historical and statutory notes, the 1988 amendment to §6502(a) was to apply to levies issued after the date of

enactment, November 10, 1988.[10]

Defendant argues that because the seizure/levy of Plaintiff's property occurred on October 9, 1992, the 1988 amendment to § 6502(a) applies. Defendant, relying on the 1988 amendment to §6502(a), contends that because it initiated, within 6 years of assessment of the penalties, a suit to reduce the penalties to judgment, the statute of limitations in which to collect the penalties by levy was extended indefinitely.

Plaintiff argues that the pre-1988 statute applies here. He relies upon Hillyer v. Comm'r Internal Revenue, 817 F.Supp. 532 (M.D. Pa. 1993). He contends that the 1988 amendment cannot apply to the instant case, even though it was to apply to levies issued after November 10, 1988, because it did not take effect until five months after the statute of limitations for collection of Plaintiff's assessments had expired on June 28, 1988. Plaintiff argues that the 1988 amendment could not breathe new life into a right that had already expired.

The Court agrees with Plaintiff and the reasoning in Hillyer. Because the 1988 amendment did not come into effect until after the statute of limitations for collection of the June 28, 1982 assessment had expired, the 1988 amendment is inapplicable here, at least as to the June 1982 assessment. According to § 6502(a), as it existed prior to 1988, there were two methods of collection available to Defendant, either collect the penalties pursuant to a

[10]In 1990, Congress again amended § 6502(a), extending the 6 year statute of limitations period to 10 years. The 1990 amendment applies to all taxes assessed after November 5, 1990 unless the period for collection of taxes has not expired.

proceeding in court or collect the penalties by levy. Here, in Plaintiff's 1983 lawsuit, Defendant received a judgment in its favor on its counterclaim for the unpaid penalties. Although Defendant's counterclaim was timely commenced within six years of the date of assessment, Defendant also chose to collect the unpaid portion of the penalty by levy. According to the pre-1988 version of § 6502(a), this levy must have been initiated within six years of the date of assessment. The fact that a judgment was obtained against Plaintiff did not extend this six year period. Defendant did not levy on Plaintiff's property until October 1992, over eleven years after the penalty was assessed against Plaintiff. Therefore, as to the June 1982 assessment, there was an overpayment of tax and this Court has jurisdiction.

As to the December 1982 assessments,[11] the statute of limitations for collection did not expire until December 1988, after the effective date of the 1988 amendment to § 6502(a). Therefore, the 1988 amendment would apply to these assessments. According to the 1988 amendment, the fact that Defendant initiated a court proceeding to collect the penalties within six years of the date of the assessments extended the time for Defendant to collect the penalties by levy until the liability for the penalties was satisfied. Hence, as to the December 1982 assessments, there was no overpayment of tax, and the Court lacks summary matter jurisdiction under the overpayment jurisdictional requirement.

[11]Neither party separated the two assessments. Both parties made their arguments only in terms of the June 1982 assessment.

4. Martinez exception

Despite not meeting the overpayment requirement as to the December 1988 assessments and regardless of whether Plaintiff satisfies the full payment requirement, this Court has subject matter jurisdiction over this entire lawsuit pursuant to Martinez v. United States, 669 F.2d 568, 569 (9th Cir. 1982). In Martinez, the Ninth Circuit recognized an exception to the overpayment requirement. It stated:

> Under Lewis v. Reynolds..., a taxpayer has the burden in a refund suit to prove overpayment of tax. Because Martinez cannot prove overpayment, the IRS argues it may offset any refund he is entitled to against his liability. It would follow that, no matter how deliberately the IRS violated its own procedures, the taxpayer would be without a remedy unless the value of the property seized exceeded his tax liability.
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> We disagree. Although styled as a refund suit, Martinez's suit more closely resembles a tort claim for conversion. A refund suit is generally based on an argument between the taxpayer and the IRS about how his tax liability is calculated. Martinez challenges neither the collection of nor his liability for the tax. He is challenging only the manner in which the government took his property in payment.

Martinez, 669 F.2d at 569.

Defendant argues that this case falls outside the Martinez exception because Plaintiff received notice of the assessments and demand for payment. The Court declines to adopt such a narrow interpretation of Martinez. Here, as in Martinez, Plaintiff is not challenging the calculation of or his liability for the penalties. He is challenging the manner in which Defendant seized and sold his property. Although styled as a claim for refund, Plaintiff's complaint more closely resembles a claim for wrongful conversion of the Swan Road Property. Accordingly, this Court has jurisdiction

of this action and Defendant's motion to dismiss based on lack of subject matter jurisdiction is denied.

B. Defendant's Motion to Dismiss for Failure to State a Claim

1. Standard of Review

Defendant's motion to dismiss is also based on Fed. R. Civ. P. 12(b)(6). A complaint may be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-56 (1957).

When deciding a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, all factual allegations are presumed to be true and all reasonable inferences are made in favor of the plaintiff. Miree v. DeKalb County, Georgia, 433 U.S. 25, 27 n. 2 (1977); Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir.), cert. denied, 454 U.S. 1031 (1981). Legal conclusions, however, couched as factual allegations are not given a presumption of truthfulness. See Jones v. Community Redevelopment Agency, 733 F.2d 646, 649-50 (9th Cir. 1984).

Pro se complaints should be construed liberally. See Haines v. Kerner, 404 U.S. 519, 520 (1972); Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir. 1987). "A pro se litigant must be given leave to amend his or her complaint, and some notice of its deficiencies, unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." See Cato v. United

States, 70 F.3d 1103, 1106 (9th Cir. 1995).

2. Discussion

Plaintiff raises several claims in his complaint. First, he claims that because the sale of the Swan Road Property occurred outside the statute of limitations, the sale was invalid. Second, Plaintiff alleges that two IRS employees committed criminal fraud by changing the first penalty assessment date from June 28, 1982 to June 28, 1992. He alleges the date was changed in order to subvert the statute of limitations which expired in 1988. Due to this fraud, Plaintiff seeks an order directing the Department of Justice to prosecute these employees and to refrain from further harassing Plaintiff. Third, Plaintiff contends that the federal tax liens issued against him in this case were invalid because they were not properly certified. Lastly, Plaintiff argues that his filing of bankruptcy somehow invalidated the October 1992 notice of seizure, requiring the IRS to file a new notice of seizure before selling the Swan Road Property.

a. Statute of Limitations

As discussed above, because the levy on the Swan Road Property, to the extent the proceeds were used to satisfy the penalties assessed against Plaintiff on June 28, 1982, was outside the statute of limitations, Plaintiff is entitled to a refund of that portion of the proceeds of the sale of the Swan Road Property used to satisfy the June 1982 penalty assessment. It is unclear from the record what portion of the proceeds were applied to the June 1982 penalty. Therefore, Defendant shall supply the Court with detailed information on how the proceeds from the sale were

applied to Plaintiff's penalty assessments so the Court may enter judgment in Plaintiff's favor accordingly.

As to the December 1982 assessments, the Court finds that the 1988 amendment to § 6502(a) applies and the levy of Plaintiff's property, to the extent the proceeds were used to satisfy the penalties assessed on December 28, 1982, was within the statute of limitations.

b. Fraud

Plaintiff alleges that two IRS employees committed fraud by changing the first penalty assessment date from June 28, 1982 to June 28, 1992 in an attempt to subvert the statute of limitations. This claim is frivolous. The alleged fraud Plaintiff complains about appears on Form 668-B, "Levy," issued October 9, 1992. Although the form incorrectly states that the first assessment occurred on June 28, 1992, this was merely a typographical error. All other documents contain the correct date. In addition, Defendant has never stated that the first assessment occurred on a date other than June 28, 1982. Therefore, Plaintiff's claim for fraud based on this error fails to state a claim under Rule 12(b)(6).

In relation to this "alleged fraud," Plaintiff seeks in his Writ of Mandamus in the Form of a Complaint an order directing the Department of Justice to prosecute these two employees for their criminal acts and to prohibit Defendant from further harassing Plaintiff. Because the Court finds that the error committed by these employees was merely typographical and because Plaintiff has failed to allege any other harassment by the Defendant, Plaintiff's

writ of mandamus is denied.

c. Tax Liens

Plaintiff argues that the tax liens filed by Defendant were invalid because they were not certified as required by 26 U.S.C. § 6065 and A.R.S. § 33-1033. Section 6065 states that "any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury." A.R.S. § 33-1033 provides:

> Certification of notices of liens, certificates or other notices affecting federal liens by the secretary of the treasury of the United States or his delegate, or by any official or entity of the United States responsible for filing or certifying notice of any other lien, entitles them to be filed or recorded and no other attestation, certification or acknowledgment is necessary.

Plaintiff's claim that the federal tax liens filed against him are invalid because they are not certified is without merit. Section 6065 applies to verifying tax returns not tax liens. In addition, as A.R.S. 33-1033 states, no certification or acknowledgment is required before a federal tax lien can be filed.

d. Notice of Seizure

Plaintiff also argues that his filing of bankruptcy somehow invalidated the notice of seizure filed by Defendant in 1992 and required Defendant to file a new notice of seizure before selling the Swan Road Property. According to 26 C.F.R. §301.6331-1(a)(4), the government cannot levy on property subject to a bankruptcy proceeding. Here, Defendant levied on the Swan Road Property and filed its notice of seizure before Plaintiff or Swan

Business Organization filed their bankruptcy petitions.[12] The Court has found no law to support Plaintiff's argument that his filing of bankruptcy somehow invalidated the notice of seizure served upon him before the bankruptcy proceedings were initiated. The Internal Revenue Laws only require that the notice of levy be given "no less than 30 days before the day of levy." 26 U.S.C. § 6331(d). Accordingly, Plaintiff's argument is without merit.

Based on the above discussion, Defendant's motion to dismiss for failure to state a claim is denied in part as to the June 1982 assessment and granted in part as to all other claims raised by Plaintiff in his complaint.[13] In addition, Plaintiff's Writ of Mandamus in the Form of a Complaint is denied.

Accordingly,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment is construed as his response to Defendant's Motion to Dismiss.

IT IS FURTHER ORDERED that Plaintiff's Writ of Mandamus in the Form of a Complaint is **DENIED.**

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss for Lack of Subject Matter is **DENIED.**

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted is **DENIED**

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[12]Defendant did not sell the Swan Road Property until after the bankruptcy proceedings had been dismissed.

[13]The Court finds that allowing Plaintiff to amend his complaint regarding the dismissed claims would be futile as an amendment would not cure the deficiencies.

IN PART as to the June 1982 penalty assessment and the statute of limitations and **GRANTED IN PART** as to all other claims raised in Plaintiff's complaint.

IT IS FURTHER ORDERED that Plaintiff is entitled to a refund of that portion of the proceeds from the sale of the Swan Road Property used to satisfy the June 1982 penalties. Because it is unclear from the record what portion of the proceeds was applied to the June 1982 penalties, if any, Defendant shall supply the Court with this information by **October 15, 2000** so the Court may enter judgment in Plaintiff's favor accordingly.

Dated this 27th day of September, 2000.

JOHN M. ROLL
U.S. District Judge